No. 22-16742

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VINCENTE TOPASNA BORJA, ET AL.,

Plaintiffs-Appellants,

v.

SCOTT T. NAGO, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Hawai‘i
Honorable Jill A. Otake, United States District Judge
(No. 1:20-cv-00433-JAO-RT)

DEFENDANT-APPELLEE SCOTT T. NAGO'S ANSWERING BRIEF

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I. INTRODUCTION

Appellants currently reside in Guam and the U.S. Virgin Islands ("Virgin Islands"),[1] where—as territorial residents—they do not have a fundamental right to vote in federal elections.[2] 1-ER-20, 21, 22-24, 30. Appellants do not dispute this, but nonetheless contend that they are entitled to vote in U.S. presidential and congressional elections because at one point (as to the Individual Appellants, most recently in 2005) they resided in the State of Hawai'i. 1-ER-9.

In Appellants' view, because the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. §§ 20301 to -11—together with Hawaii's Uniform Military and Overseas Voters Act ("UMOVA"), Haw. Rev. Stat. §§ 15D-1 to -18, and its accompanying rule, Hawaii Administrative Rules ("HAR") § 3-177-600(d)—permit former Hawai'i residents who live in foreign countries or the Northern Mariana Islands ("NMI") to vote in federal elections, equal protection demands the same be afforded to former Hawai'i residents who live in Guam, the

[1] Citations to Appellants' Excerpts of Record are formatted as [Vol.#]-ER-[Page#].

[2] Individual Appellants are Vincente Topasna Borja ("Borja"), Edmund Frederick Schroeder, Jr. ("Schroeder"), Ravinder Singh Nagi ("R. Nagi"), Patricia Arroryo Rodriguez ("Rodriguez"), and Laura Castillo Nagi ("L. Nagi"). 1-ER-9. Appellant Right to Democracy Project (formerly known as Equally American Legal and Defense Education Fund) has members who live in Guam, the Virgin Islands, Puerto Rico, and American Samoa. 1-ER-9-10.

Virgin Islands, Puerto Rico, and American Samoa, like Appellants. OB at 1. Appellants are incorrect.

The district court properly rejected Appellants' arguments, upholding UOCAVA's and UMOVA's constitutionality and concluding that they both survive rational basis review. Because territorial residents do not have a fundamental right to vote in federal elections or in their former states of residence, the district court correctly concluded that this case does not implicate the fundamental right to vote, and strict scrutiny therefore does not apply on that basis. Nor does strict or intermediate scrutiny apply based on membership in a suspect or quasi-suspect class; Appellants are members of neither. As the district court concluded, rational basis review applies, and UOCAVA and UMOVA easily satisfy it. And in any event, Appellants' proposed remedy is incorrect for the reasons stated in the Federal Appellees' answering brief. *See* Federal Appellees' Answering Brief at 46-49.

II. COUNTERSTATEMENT OF JURISDICTION

The district court had jurisdiction over this dispute pursuant to 28 U.S.C. § 1331. 1-ER-153. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. After the district court entered judgment on September 6, 2022, Appellants filed a timely notice of appeal on November 4, 2022. 1-ER-5, 173-74.

III. COUNTERSTATEMENT OF THE ISSUES

1. Whether the district court properly concluded that UOCAVA, UMOVA, and HAR § 3-177-600 do not violate the Equal Protection Clause of the U.S. Constitution.

IV. CONCISE COUNTERSTATEMENT OF THE CASE

A. UOCAVA

Since 1986, UOCAVA has permitted uniformed service members, their eligible family members, and overseas U.S. citizens to vote in federal elections by absentee ballot. Pub. L. No. 99-410, 100 Stat. 924 (1986) (now codified as 52 U.S.C. Ch. 203); *see* 52 U.S.C. § 20302(a)(1) ("Each State shall -- (1) permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office[.]").

UOCAVA defines an "overseas voter" in relevant part as, "a person who resides outside the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States[,]" or "a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States." 52 U.S.C. § 20310(5)(b), (c). The "United States" is defined in UOCAVA as "the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa." 52 U.S.C. §

20310(8). Thus, former Hawai‘i residents living in the United States (including Puerto Rico, Guam, the Virgin Islands, and American Samoa) do not qualify as "overseas voters" under UOCAVA and cannot vote absentee in Hawai‘i in federal elections. *See* 52 U.S.C. § 20310; *see also* 1-ER-93, ¶ 8.

After UOCAVA's enactment, the NMI was established and its domiciliaries were recognized as citizens of the United States. Proclamation 5564, 51 Fed. Reg. 40399 (Nov. 3, 1986), 1986 WL 796859. Although there were subsequent amendments to UOCAVA, including the Military and Overseas Voter Empowerment Act ("MOVE Act"), Pub. L. No. 111-84, Subtitle H, §§ 575-589, 123 Stat. 2190, 2318-35 (2009), at no time was the definition of the "United States" amended to include the NMI. Accordingly, former Hawai‘i residents who relocated to the NMI may qualify as "overseas voters" under UOCAVA. *See* 52 U.S.C. § 20310.

B. UMOVA and HAR § 3-177-600

In 2012, Hawai‘i enacted UMOVA, a state law that extended absentee voting rights in federal, state, and local elections to uniformed-service and overseas voters. Act 226, 2012 Haw. Sess. Laws 798. Unlike UOCAVA, UMOVA's definition of an "overseas voter" does not include former Hawai‘i residents who

move to *any* U.S. territory, including the NMI. *See* Haw. Rev. Stat. § 15D-2.[3] It is therefore undisputed that, as Appellants alleged in their complaint, "Hawaii UMOVA does not grant enfranchisement to former state residents who move to *any* Territory." 1-ER-162-63, ¶ 53 (emphasis in original).

UMOVA and its accompanying rule, HAR § 3-177-600, nevertheless acknowledge that UOCAVA mandates Hawaii's compliance with federal law. *See* Haw. Rev. Stat. § 15D-4(a) ("The chief election officer shall be the state official responsible for implementing this chapter and the State's responsibilities under the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. section 1973ff et seq."); *see also* HAR § 3-177-600(d)(4) (providing that "[b]allot packages may generally be issued . . . [p]ursuant to a request by a voter covered under . . . the Uniformed and Overseas Citizens Absentee Voting Act of 1986, as amended, or any other applicable federal or state law.").

C. Stipulated Facts

The parties stipulated that the Individual Appellants:

- are not current residents of Hawai'i;
- are not currently registered to vote in Hawai'i;

[3] HRS § 15D-2 defines "[o]verseas voter" as "a United States citizen who is living outside the United States." "'United States', used in the territorial sense," is defined as "the several states, the District of Columbia, Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States." Haw. Rev. Stat. § 15D-2.

- did not apply to register to vote absentee nor request an absentee ballot pursuant to UOCAVA or UMOVA;
- are not "overseas voters" or "covered voters" as defined by HRS § 15D-2;
- are not "absent uniformed services voters" or "overseas voters" as defined by 52 U.S.C. § 20310(1) and (5);
- seek to vote absentee in presidential and congressional elections in Hawai'i; and
- do not seek to vote absentee in State or local elections in Hawai'i.

1-ER-91-94 ¶¶ 1-8, 14-15. Appellants Borja, Schroeder, and Rodriguez are registered to vote in Guam, and Appellants R. Nagi and L. Nagi are registered to vote in the Virgin Islands. 1-ER-93, ¶¶ 9-13.

D. District Court Proceeding

The operative complaint—Appellants' Third Amended Complaint (the "Complaint")—asserts one claim, brought under 42 U.S.C. § 1983, against three distinct sets of Appellees: (1) the Federal Appellees, comprising two federal officials (Secretary of Defense Lloyd Austin and Federal Voting Assistance Program Director David Beirne) and the United States itself; (2) Hawaii's Chief Election Officer, Scott T. Nago ("Appellee Nago"); and (3) the City Clerk of the

City and County of Honolulu, Glen Takahashi ("Appellee Takahashi"). 1-ER-151-53, ¶¶ 21-28, 30.

Appellants argue that UOCAVA and UMOVA violate the equal protection and due process guarantees of the Fifth and Fourteenth Amendments. 1-ER-166-67, ¶ 63. Appellants sought an order from the district court:

> i. Declaring that UOCAVA, Hawaii UMOVA, and H.A.R. § 3-177-600 violate the equal protection guarantees of the Fifth and Fourteenth Amendments, and violate 42 U.S.C. § 1983, by extending absentee voting privileges to former Hawaii residents living [in] foreign countries or NMI but not to former Hawaii residents living in Puerto Rico, Guam, the U.S. Virgin Islands, or American Samoa;
>
> ii. Striking and ordering unenforceable the inclusion of "the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa" in the definition of "United States" in 52 U.S.C. § 20310(8) because the inclusion of such language has [ ] unconstitutional effects . . . ; and
>
> iii. Striking and ordering unenforceable the inclusion of "Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States" in the definition of "United States" in H.R.S. § 15D-2 because the inclusion of such language has [ ] unconstitutional effects . . .

1-ER-168-69. Appellants' Complaint additionally sought a preliminary and permanent injunction against the enforcement of UOCAVA, UMOVA, and HAR § 3-177-600. 1-ER-169.[4]

The district court ultimately granted Appellees' cross-motions for summary judgment and denied Appellants' motion for summary judgment. 1-ER-7. The district court determined that strict scrutiny and intermediate scrutiny were inapplicable because UOCAVA, UMOVA, and HAR § 3-177-600 do not infringe upon the right to vote, given that territorial residents do not have a fundamental right to vote in federal elections. 1-ER-20-21. The district court explained that U.S. citizens have no fundamental right to vote in their former state of residence, and that Appellants do not qualify as members of a suspect or quasi-suspect class. 1-ER-22-32. Because the district court found that there was no infringement of a fundamental right or involvement of a suspect or quasi-suspect class, the applicable standard of review was rational basis. 1-ER-32-34.

The district court ultimately concluded that UOCAVA, UMOVA, and HAR § 3-177-600 easily survive rational basis review because it is rational to define Guam, the Virgin Islands, Puerto Rico, and American Samoa—and not the NMI—as part of the "United States." 1-ER-32-34. The district court also reasoned that it

[4] Appellants did not seek injunctive relief by motion.

was rational to extend absentee voting rights to those who move to foreign countries. 1-ER-40-44.

Judgment was entered in favor of Appellees on September 6, 2022. 1-ER-5. This appeal followed.

V. SUMMARY OF ARGUMENT

This Court should affirm the district court's well-reasoned decision upholding UMOVA's constitutionality. The district court properly concluded that this case does not implicate any fundamental right to vote because of established law that: (1) territorial residents do not have a fundamental right to vote in federal elections and (2) U.S citizens do not have a fundamental right to vote in their former states of residence. And without being members of a suspect or quasi-suspect class, Appellants are left with rational basis review, a hurdle in which UMOVA's distinction between "overseas voters" easily overcomes.

VI. STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *Grenning v. Miller-Stout*, 739 F.3d 1235, 1238 (9th Cir. 2014). Summary judgment is appropriate when, "with the evidence viewed in the light most favorable to the non-moving party, there are no genuine issues of material fact, so that the moving party is entitled to a judgment as a matter of law." *San Diego*

Police Officers' Ass'n v. San Diego City Emps.' Ret. Sys., 568 F.3d 725, 733 (9th Cir. 2009).

VII. ARGUMENT

The district court's decision should be affirmed. Appellee Nago respectfully incorporates the arguments set forth by the Federal Appellees on pages 20-49 of the Federal Appellees' Answering Brief. *See* Fed. R. App. P. R. 28(i).[5]

A. UMOVA is constitutional.

1. Any challenge to UMOVA must be evaluated under rational basis, not strict scrutiny or intermediate scrutiny.

The district court properly concluded that strict scrutiny and intermediate scrutiny are inapplicable because UOCAVA, UMOVA, and HAR § 3-177-600 do not infringe on the right to vote. 1-ER-20. That is because "residents of the territories have no fundamental right to vote in federal elections" and "U.S. citizens who move to a territory or another state have no constitutional right to vote in their *former* states of residence[.]" 1-ER-22 (internal citation omitted) (emphasis in original). Appellants' argument for intermediate scrutiny was also

[5] The Federal Appellees' standing argument is incorrect insofar as UOCAVA preempts UMOVA. *Cf. Att'y Gen. of Terr. of Guam v. United States*, 738 F.2d 1017, 1020 (9th Cir. 1984) (acknowledging that the Overseas Citizens Voting Rights Act, the precursor to UOCAVA, preempted state residency voting requirements). While Hawai'i decided not to extend absentee voting rights to former residents living in any U.S. territory, UOCAVA compels it to do so for former residents living in the NMI.

correctly rejected by the district court because Appellants are not members of a suspect or quasi-suspect class. 1-ER-29-32.

On appeal, Appellants argue that UOCAVA and UMOVA should be subject to strict scrutiny because they selectively withhold the right to vote for some former Hawai‘i residents but not others. OB at 29. Appellants posit that strict scrutiny is warranted because UOCAVA and UMOVA extend the fundamental right to vote in a discriminatory manner. *Id.* Alternatively, Appellants argue that UOCAVA and UMOVA would not withstand intermediate scrutiny "because they discriminate against a suspect class that is politically powerless." OB at 50. For numerous reasons, Appellants' arguments lack merit.

a. UMOVA does not burden a fundamental right.

As the district court explained—and as several other courts have held—territorial residents do not have a constitutional right to vote in federal elections. 1-ER-20, 21, 22-24, 30; *see also Igartua De La Rosa v. United States*, 229 F.3d 80, 83 (1st Cir. 2000) ("*Igartua II*"); *Igartua-De La Rosa v. United States*, 417 F.3d 145, 148 (1st Cir. 2005) (en banc). Section 1 of Article II of the U.S. Constitution states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress[.]" U.S. Const. art. II, § 1, cl. 2. Thus, under the U.S. Constitution, "[t]he right to vote in

presidential elections under Article II inheres not in citizens but in states: citizens vote indirectly for the President by voting for state electors." *Id.*; U.S. Const. amend. XXIII, § 1; *Att'y Gen. of Terr. of Guam*, 738 F.2d at 1019. Because U.S. territories are not states, they "can have no electors, and [residents] cannot exercise individual votes in a presidential election." *Att'y Gen. of Terr. Guam*, 738 F.2d at 1019; *see also Igartua II*, 229 F.3d at 83 (holding that "Puerto Rico, which is not a State, may not designate electors to the electoral college," and so "residents of Puerto Rico have no constitutional right to participate in the national election of the President and Vice-President"); *Igartua-De La Rosa*, 417 F.3d at 148 ("That the franchise for choosing electors is confined to 'states' cannot be 'unconstitutional' because it is what the Constitution itself provides. Hence it does no good to stress how important is 'the right to vote' for President."). Nor is there a fundamental right for territorial residents to vote for members of Congress representing the states. *Igartua v. United States*, 626 F.3d 592, 596 (1st Cir. 2010) ("The text of Article I is clear that only the people of *a state* may choose the members of the House of Representatives from that state.") (emphasis in original).

There is also no constitutional right for U.S. citizens to vote in their *former* states of residence. *Segovia v. United States*, 880 F.3d 384, 390 (7th Cir. 2018) ("The unmistakable conclusion is that, absent a constitutional amendment, only residents of the 50 States have the right to vote in federal elections. The

Appellants have no special right simply because they *used to* live in a State.") (emphasis in original); *see also* 1-ER-22. The U.S. Supreme Court has repeatedly held that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens *in the jurisdiction*." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (emphasis added). And it has explained that "[n]o decision of this Court has extended the 'one man, one vote' principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions." *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68 (1978). "On the contrary," the Supreme Court's cases "have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside *within* its borders." *Id.* at 68-69 (emphasis added).

Appellants ignore this key geographical distinction and instead argue at length about how strict scrutiny applies "no matter where former Hawaii residents live" and "where, as here, a challenged law disenfranchises citizens who are subject to the elected officials' authority." OB at 30-35. These assertions are inconsistent with established case law. Appellants simply have not demonstrated that UOCAVA, UMOVA, or HAR § 3-177-600 affect a fundamental right, and strict scrutiny cannot apply on that basis.

b. Appellants are not members of a suspect or quasi-suspect class.

The district court also properly concluded that Appellants are not members of a suspect or quasi-suspect class. 1-ER-29-32. A suspect or quasi-suspect class is one that "either 'possesses an immutable characteristic determined solely by the accident of birth,' or is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Segovia*, 880 F.3d at 390 (quoting *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 638 (7th Cir. 2007)).

Here, Appellants claim they are "a suspect class that is politically powerless" because territorial residents have "endured a long history of discrimination[,]" "have no characteristics preventing them from contributing to society[,]" "are a politically powerless group[,]" and "the inhabited territories are all racially or ethnically majority-minority." OB at 50-52. This case, however, "does not concern territorial residents as a whole; it concerns U.S. citizens who move from Hawai'i to certain territories." 1-ER-30. The remedy sought by Appellants would only confer a benefit to territorial residents who "previously lived in Hawai'i." 1-ER-30. Appellants have not demonstrated that the group affected by the challenged laws, when properly defined, is a suspect class.

Moreover, various circuits have ruled that former U.S. citizens living in territories are not suspect or quasi-suspect classes because their traits are not immutable. *See Segovia*, 880 F.3d at 390 (holding former Illinois residents living in territories do not constitute a suspect class because their "current condition is not immutable, as nothing is preventing them from moving back to Illinois."); *Igartua De La Rosa v. United States*, 32 F.3d 8, 10 (1st Cir. 1994) ("*Igartua I*") (finding individuals "who previously voted in presidential elections while residing elsewhere" do not constitute a suspect class). Because Appellants' challenge does not implicate a fundamental right and they are not members of a suspect or quasi-suspect class, rational basis review applies.

2. UMOVA satisfies rational basis review.

The district court correctly held that "UMOVA easily survives rational basis review" because "UMOVA's distinction between those who live in foreign countries and those who move anywhere within the 'United States' is rationally related to its purpose of enabling those who are outside the 'United States' to participate in elections." 1-ER-34. Appellants' arguments to the contrary are unavailing.

Under rational basis review, "a statute must be 'rationally related to a legitimate government purpose.'" *Dent v. Sessions*, 900 F.3d 1075, 1082 (9th Cir. 2018) (quoting *Hernandez-Mancilla v. Holder*, 633 F.3d 1128, 1185 (9th Cir.

2011)). "Using such rational-basis review, a statute is presumed constitutional, and 'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" *Hernandez-Mancilla*, 633 F.3d at 1185 (quoting *Masnauskas v. Gonzoles*, 432 F.3d 1067, 1071 (9th Cir. 2005)). Further, courts "are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Dent*, 900 F.3d at 1082 (internal citation omitted). And "[i]f the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (internal citation omitted).

The legislative purpose for UMOVA was to "ensure the ability of members of the military and other[] eligible voters who are overseas to participate in all elections for federal, state, and local offices[.]" S. Stand. Comm. Rep. No. 2450, at 1. The Hawai'i Legislature found that "military personnel and overseas civilians face a variety of challenges when voting in United States elections," and that UOCAVA and the MOVE Act had "not been wholly effective in overcoming the difficulties overseas voter face." *Id.* at 1-2. UMOVA was therefore adopted as a reform measure to "extend[ ] the assistance and protections for military and overseas voters under existing federal law to state elections," and to "uniformly

appl[y] the military and overseas voting process to all covered elections of which the State has primary administrative responsibility." *Id.* at 2.

The district court held that "UMOVA easily survives rational basis review[.]" 1-ER-34. That is because UMOVA's distinction between former Hawai'i residents living abroad and those living within the United States is rationally related to the legislative purpose of ensuring that eligible voters living *outside* of the United States can participate in elections. This Court should affirm the district court's decision.

B. The remedy Appellants propose is incorrect.

Should the Court conclude that Appellants have demonstrated a constitutional violation (for the reasons outlined above, they have not), the Court should reject Appellants' proposed remedy.

Appellee Nago joins in Federal Appellees' argument that the proper remedy would (in the event a constitutional violation is found) be to treat the NMI like the rest of the U.S. territories and consider it part of the United States. The Seventh Circuit's decision in *Segovia* is instructive:

> Under *Morales-Santana*, we should presume that Congress would have wanted the general rule—that U.S. territories are part of the United States—to control over the exception for the Northern Marianas. Therefore, instead of extending voting rights to all the territories, the proper remedy would be to extend them to none of the territories.

880 F.3d 384, 389 n.1. This is further supported by UMOVA's definition of an "overseas voter," which does not include former Hawai'i residents who move to any U.S. territory. *See* Haw. Rev. Stat. § 15D-2.

VIII. CONCLUSION

For the foregoing reasons, Appellee Nago respectfully requests that this Court affirm the district court's order and judgment.

DATED: Honolulu, Hawai'i, July 31, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE FOR BRIEFS

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure ("FRAP") Rule 32(a)(7)(B)(i) because this brief contains 3,765 words. This brief also complies with the typeface requirements of FRAP Rule 32(a)(5) and the type styles requirements of FRAP Rule 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Times New Roman 14-point font.

DATED: Honolulu, Hawai'i, July 31, 2023.

Respectfully submitted,

/s/ Jennifer H. Tran
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STATEMENT OF RELATED CASES

Defendant-Appellee Scott T. Nago is not aware of any related cases pending before this Court.

DATED: Honolulu, Hawai‘i, July 31, 2023.

Respectfully submitted,

/s/ Jennifer H. Tran
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CERTIFICATE OF SERVICE

I certify that I electronically filed Defendant-Appellee Scott T. Nago's Answering Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATED: Honolulu, Hawai'i, July 31, 2023.

Respectfully submitted,

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